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IN THE

Supreme Court of the United States

October Term, 1953

346 U.S.
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16

No. 127

CHROMIUM PRODUCTS CORPORATION,
Petitioner

v.

RECONSTRUCTION FINANCE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURTON K. WHEELER
ROBERT G. SEAKS
Washington, D. C.
HORACE S. DAVIS
Billings, Montana
FRED L. GIBSON
Livingston, Montana
Attorneys for Petitioner

Of Counsel:
WHEELER & WHEELER
704 Southern Bldg.
Washington 5, D. C.
BROWN, DAVIS & SANDS
Montana National Bank Building
Billings, Montana

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Petitioner Chromium Products Corporation respectfully prays that a writ of certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Ninth Circuit, one judge dissenting, which reversed a decision and judgment for Petitioner rendered by the United States District Court for the District of Montana, Billings Division.

OPINIONS BELOW

The opinion of the Court of Appeals (R.162-179) is reported in 202 F. 2d 664. The opinion of the District Court (R.39-42) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1953 (R.180). A timely petition for reconsideration was denied on March 18, 1953 (R.181). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

QUESTION PRESENTED

Metals Reserve Company, a war-time federal corporation created by RFC, leased Petitioner's chromium mine for a five-year term at the instance of WPB. The lease fixed compensation on a per-unit-mined basis, but provided a minimum annual royalty during periods of non-operation or small-scale operation. WPB, concluding that chromium stocks were then adequate, determined upon a temporary suspension of operations at Petitioner's mine. The question presented is whether Metals Reserve Company, during a time when it remained in possession of the mine and the lease remained in effect, could refuse to pay the minimum royalty on the ground that WPB's decision was an act of sovereignty or "restriction of government" which operated as *force majeure* to suspend its obligation under the lease and excuse the payment of royalty.

STATUTES AND ORDER INVOLVED

Section 5 of the Act of June 25, 1940 (54 Stat. 573) provided in part:

> Section 5d of the Reconstruction Finance Corporation Act—is hereby amended by adding at the end thereof the following new pararaphs:
>
> In order to aid the Government of the United States in its national defense program, the Corporation is authorized—

(2) When requested by the Federal Loan Administrator, with the approval of the President, to create or to organize a corporation or corporations, with power (a) to produce, acquire, and carry strategic and critical materials as defined by the President, (b) to purchase and lease land, to purchase, lease, build, and expand plants—"

The Joint resolution of June 30, 1945 (59 Stat. 310) provided:

That, notwithstanding any other provisions of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of account, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved:—Metals Reserve Corporation—

Section 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution.—

Executive Order No. 9024, dated January 16, 1942, and published in 7 Fed. Reg. 329 *et seq.*, provided as follows:

EXECUTIVE ORDER

Establishing the War Production Board in the Executive Office of the President and Defining Its Functions and Duties.

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to define further the functions and duties of the Office for Emergency Management with respect to the state of war declared to exist by Joint Resolutions of the Congress, approved December 8, 1941 and December

11, 1941, respectively, and for the purpose of assuring the most effective prosecution of war procurement and production, it is hereby ordered as follows:

1. There is established within the Office for Emergency Management of the Executive Office of the President a War Production Board, hereinafter referred to as the Board. The Board shall consist of a Chairman, to be appointed by the President, the Secretary of War, the Secretary of the Navy, the Federal Loan Administrator, the Director General and the Associate Director General of the Office of Production Management, the Administrator of the Office of Price Administration, the Chairman of the Board of Economic Warfare, and the Special Assistant to the President supervising the defense aid program.

2. The Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

(a) Exercise general direction over the war procurement and production program.

(b) Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

(c) Perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No. 8875 of August 28, 1941.

(d) Supervise the Office of Production Management in the performance of its responsibilities and duties, and direct such changes in its organization as he may deem necessary.

(e) Report from time to time to the President on the progress of war procurement and production; and perform such other duties as the President may direct.

3. Federal departments, establishments, and agencies shall comply with the policies, plans, methods, and procedures in respect to war procurement and production as determined by the Chairman; and shall

furnish to the Chairman such information relating to war procurement and production as he may deem necessary for the performance of his duties.

4. The Army and Navy Munitions Board shall report to the President through the Chairman of the War Production Board.

5. The Chairman may exercise the powers, authority, and discretion conferred upon him by this Order through such officials or agencies and in such manner as he may determine; and his decisions shall be final.

6. The Chairman is further authorized within the limits of such funds as may be allocated or appropriated to the Board to employ necessary personnel and make provision for necessary supplies, facilities, and services.

7. The Supply Priorities and Allocations Board, established by the Executive Order of August 28, 1941, is hereby abolished, and its personnel, records, and property transferred to the Board. The Executive Orders No. 8629 of January 7, 1941, No. 8875 of August 28, 1941, No. 8891 of September 4, 1941, No. 8942 of November 19, 1941, No. 9001 of December 27, 1941, and No. 9023 of January 14, 1942, are hereby amended accordingly, and any provisions of these or other pertinent Executive Orders conflicting with this Order are hereby superseded.

FRANKLIN D. ROOSEVELT

The White House, January 16, 1942.

STATEMENT

On May 27, 1941, Petitioner, a Montana corporation, entered into a lease agreement with Respondent's predecessor in interest, Metals Reserve Company, whereby Petitioner leased to that Company its Benbow Mine in Stillwater County, Montana. Metals Reserve Company was a corporation organized, and all of whose stock was held, by Respondent Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 573) empower-

ing RFC, on certain conditions, to create corporations with authority to produce and acquire strategic and critical materials. On June 30, 1945, Respondent RFC succeeded to all the rights and obligations of Metals Reserve Company (59 Stat. 310).[1]

The following constitute the important terms and conditions of the lease (set out in full at R.8-28):

1. Metals Reserve Company was granted the right to mine and remove from the leased properties all chromium bearing ores and other minerals (Par. 1, R.10-11).

2. Metals Reserve Company agreed to compensate Petitioner by the payment of a royalty of 3.57¢ per 20 pound unit of chromic oxide recovered, and 10% of the net return from other minerals (Par. 4, R.12-13), payable quarterly 30 days after the conclusion of the quarter (Par. 5, R.13), and based on records to be maintained by the lessee (Par. 8, R.15-17). The lessee further agreed that the minimum royalty in any one calendar year of the lease should be no less than $30,000 (*Ibid.*).

3. The lease was for a term of 5 years (R.10) but might be cancelled by the lessee at any time upon ninety days notice to the lessor and payment of $1,000 (Par. 17, R. 23).

4. The lease contained customary provisions respecting covenants of title (Par. 21, R.24), requiring the lessee to conduct operations in an efficient minerlike manner (Par. 13, R.20-21), defining the obligations of the parties on the termination of the lease (Par. 18, R.23-24; Par. 19, R.24; Par. 27, R.25-26), and otherwise fixing the details of the lease relationship.

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[1] There are no questions as to the validity of Metals Reserve Company's creation, its power to enter into the lease, or the later assumption by Respondent of its obligations. Nor are there any factual issues between the parties.

The controversy between the parties grows out of Paragraphs 9 and 29 of the lease. Paragraph 9, after fixing a minimum annual royalty of $30,000 per year, continues (R.17):

> "—provided. however, should Lessee's construction or development or mining or milling operations or any other operation hereunder be suspended because of any of the causes or reasons set forth in Paragraph 29 hereof Lessee's obligation to pay a minimum royalty as aforesaid shall be suspended during any and all periods where such causes or reasons exist—."

Paragraph 29 of the lease reads in full as follows (R.26-27):

> "29. Anything in this Lease contained to the contrary notwithstanding, any strike, lockout, differences with workmen, accident, fire, explosion, flood, earthquake, embargo, mobilization, war, foreign war, hostility, riot, *requirement, regulation, restriction or other act of any government or governments, whether legal or otherwise,* acts of public enemies, the elements, force majeure, inability to secure or delay in securing cars, labor, raw materials, fuel or other supplies or material or electric power necessary for the operation of the leased premises or the operation of Lessee's facilities, failure of the ore supply or loss of the ore body in the said leased premises or inability to secure sufficient ore of the grade required for concentrating from the said leased premises, unforeseen metallurgical or milling delays, delays or interruptions in transportation by rail, water or otherwise, damage to or destruction of such mines or plants or other operating facilities *and any other contingency, whether or not of the nature or character hereinbefore specifically enumerated, which is beyond the control of Lessee* or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist. (Emphasis added).

Metals Reserve Company took possession of the properties in 1942 and conducted full-scale mining and milling operations (through its agent, Anaconda Copper Mining) during 1942 and much of 1943 (See R.100-103; District Court Finding 10, R.50). Operations were reduced in scale during 1943 and by January 1, 1944, all production had ceased and only such work was being done as was required to maintain potential production capacity.[1] Metals Reserve Company paid the royalties through December 31, 1943, and thereafter paid no royalty (R.52), but it remained in exclusive possession of the mine until January 31, 1945 (District Court Finding 10, R.50). By letter of October 25. 1944, Metal Reserve Company gave notice of its election to terminate the lease agreement as of January 31, 1945 (R. 135-138). Demand for payment of the minimum royalty for the period January 1, 1944 to January 31, 1945 (aggregating $32,500 (R. 54-55) was duly made by Petitioner and refused by Metals Reserve Company (District Court Finding 15, R. 52).[2]

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[1] The superintendent of milling operations at the mine, an employee of Anaconda Copper Mining Company, testified at the trial that production ceased on June 19, 1943 (R. 82), although some ore may have been later taken from out of the old chutes as a preventive measure (R. 85). Cessation in June was to facilitate work in another property, also being worked by Anaconda Copper Mining Company as operating agent for Metals Reserve Company, there being a shortage of labor at the time (R. 83). The supervising engineer for Metals Reserve Company agreed that production ceased in June 1943 but testified that some development work, including sinking a shaft, was subsequently undertaken (R. 93-94). After September 1943, maintenance men and fire guards were retained at the mine so as to maintain it "in a sufficient standby condition so that it could be indefinitely closed without damage to the property." (R. 84). According to a letter from the Secretary of Commerce to the Chairman of the War Production Board dated October 26, 1943 (Ex. 10, R. 124-125), chrome production ceased at the mine in "late September" 1943.

[2] Correspondence between Petitioner and Metals Reserve Company, demanding and refusing payment of the minimum royalty, is set out at R. 132-133 (Ex. 15), R. 134-135 (Ex. 16), R. 135-138 (Ex. 17), R. 140-141 (Ex. 19), R. 142-143 (Ex. 20).

Metals Reserve Company asserted that the cessation of work at the mine was taken pursuant to action of the War Production Board which, under Paragraph 29 of the lease, constituted a requirement, regulation, or restriction of government excusing the obligation to pay royalties. Metal Reserve Company, by letter of September 4, 1943 to the War Production Board (Chief of the Ferro Alloys Branch) had advised the Board in detail of the operations at the mine in question, including such matters as past production, current capacity, employees engaged, and costs of operations, and had concluded that the Metals Reserve Company would "appreciate your recommendations as to procedure on further development and production—" (Ex. 1, R.100-104). To this inquiry, H. G. Batcheller, Operations Vice Chairman of the War Production Board, responded by letter of September 13, 1943 (R.107-111).

The Batcheller letter, which both courts below regarded as crucial in this case, commenced by stating the desirability of reviewing the history of Montana chrome development (R.108). In broad outline, the letter explained that unfavorable war developments in 1941 made it problematical that the United States could continue to have access to such customary sources of chrome supply as Turkey, various South Pacific islands, and South Africa (R.108-109); that the United States therefore took steps to develop chrome production in Montana (R.109-110); and that since 1941 chrome supplies had actually risen and access to supplies was more assured (R.110). The Batcheller letter concluded (R.111):

> "In view of the present stringent manpower situation and the lack of need for Montana concentrates as outlined above, we believe it advisable to divert the men now employed in mining low grade chrome concentrates in Montana into the production of more critically needed materials such as copper and zinc. We, therefore, request that you shut down all oper-

ations at the Benbow and Mouat-Sampson properties except for such maintenance men as are necessary to keep both mines and mills in sufficiently good condition so that either or both operations could be revived in the event that the chromite picture should change for the worse."

The War Production Board (or its predecessor, the Office of Production Management) was always, in fact, the instrumentality of the United States in control and direction of the operation at the Benbow mine. WPB, by its own statement, was the original "sponsor" of development and production from the mine (R.108). Metals Reserve Company also recognized that the lease was orginally executed "upon recommendation of the Office of Production Management and the War Production Board," (R.100). Immediately prior to the Batcheller letter, Anaconda Company Mining Company in writing to its immediate principal, Metals Reserve Company, recorded its "understanding—that the War Production Board feels that they have enough chrome concentrate coming from abroad so that they do not wish to operate the Mouat and Benbow properties at this time" (R.104-105).

After the suspension of active mining operations, Defense Plant Corporation (then acting for Metals Reserve Company) wrote to WPB stating that "action was taken immediately to comply" with the request of the Batcheller letter, but pointing out that "maintenance expenses are considerable" and, therefore, requesting "that you kindly notify us as soon as you have determined that—said properties are no longer required as standby plants in connection with the war effort, and permission may be granted to us to liquidate either or both plants" (R.125-126). The WPB response in March 1944 was "that it is our decision to continue to hold these plants in standby condition" (R.131). On October 6, 1944, WPB advised that "in view of the present chrome ore supply position

plus gradually improving shipping conditions, we no longer consider it essential to the present War Effort to maintain the Benbow Mine and Mill in stand-by condition" (R.138-139). Formal notice for cancellation of the lease, as described above, followed.

On these facts, the District Court rendered judgment for plaintiff (Petitioner here), holding that the Batcheller letter, on which Respondent alone relied, did not excuse non-performance of the obligation to pay a minimum royalty.

The Court of Appeals reversed in a 2-1 decision. The majority believed that, under *Horowitz* v. *United States*, 267 U.S. 458, the Batcheller letter "was the sovereign's act" (R.167), constituting a restriction of Government within the language of section 29 (R.162-169). Circuit Judge Pope, dissenting (R.169-179) thought that the interpretation given the lease by the majority constituted the lease "an extraordinary, one-sided, and delusive arrangement" (R.170). He believed that the Batcheller letter was not the public and general act of a sovereign, within the *Horowitz* doctrine, but a simple act of non-performance by the lessee after the "lessee no longer needed the ore, and said so" (R.177).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred—

1. In holding that the suspension of operations at Petitioner's mine, directed by WPB, was an "act of sovereignty" excusing the obligation for rental payments under the lease, rather that a particularized business decision that the product of the mine was not temporarily needed;

2. In failing to recognize that Metals Reserve Company was merely the agency and instrumentality through

which WPB effectuated its business decisions to mine, or not mine, chromium ores; and

3. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I

This case affords the Court an opportunity to reexamine and apply an important principle of law which has received no treatment from it since 1925, and as to which conflict and disagreement have developed among the courts below.

This principle of law differentiates between two types of acts which the United States may take, the effect of which is to impede or stop performance of a contract entered into by the United States or one of its instrumentalities. In the first place, appropriate Government authority may enact or promulgate a rule or order, public and general in character, as a manifestation of its sovereignty. An act of this character, though it has the effect of impeding or stopping performance of a contract, does not give rise to liability on the part of the United States; such an act excuses strict performance by the Government of its contracts just as it would furnish an excuse to a private obligor.

In the second place, the Government official, having responsibility for performance of a Government contract, may simply give orders which burden or render impossible further performance under the particular contract. This type of action is said to reflect the Government's acting "as a contractor, and not as a sovereign," and does not excuse non-performance of its contract by the United States.

The foregoing principle is one of both wide general application and antiquity. The Court of Claims enunciated it in 1865. It has been before this Court only once,

in 1925, in *Horowitz* v. *United States*, 267 U.S. 458. There, this Court did hardly more than quote with approval the language and holding of the Court of Claims in 1865. This Court's opinion was (p. 461):

> "It has long been held by the court of claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. Deming v. United States, 1 Ct. Cl. 190, 191; Jones v. United States, 1 Ct. Cl. 383, 384; Wilson v. United States, 11 Ct. Cl. 513, 520. In the Jones case, 1 Ct. Cl. 383, the court said: 'The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons . . . . In this court, the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.'"

The Court of Claims has followed and applied the principle in a great many cases.[1] Lower federal courts have

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[1] Among more recent cases, the following are illustrative: *Hallman* v. *United States*, 68 F. Supp. 204 (Ct. Cl., 1946); *Kelly Co.* v. *United States*, 69 F. Supp. 117 (Ct. Cl., 1947); *Froemming Bros.* v. *United States*, 70 F. Supp. 125 (Ct. Cl., 1947); *Clemmer Const. Co.* v. *United States*, 71 F. Supp. 917 (Ct. Cl., 1947); *Beuttas* v. *United States*, 77 F. Supp. 933 (Ct. Cl., 1948); *Piggly Wiggly Corp.* v. *United States*, 81 F. Supp. 819 (Ct. Cl., 1949); *McCrary Co.* v. *United States*, 84 F. Supp. 368 (Ct. Cl., 1949); *Ottinger* v. *United States*, 88 F. Supp. 881 (Ct. Cl., 1950); *Borg-Warner Corp.* v. *United States*, 89 F. Supp. 1013 (Ct. Cl., 1950); *Barnes* v. *United States*, 105 F. Supp. 817 (Ct. Cl., 1952).

also cited and applied the *Jones* and *Horowitz* cases. See, e.g., *New England Tree Expert Co.* v. *United States,* 69 F. Supp. 396, (D.C.R.I., 1946); *Evans & Co.,* v. *United States,* 74 F. Supp. 58, (E.D. Pa., 1947). But Judge Holtzoff expressed the view that the United States could not act in any way other than in its sovereign capacity, and that the Horowitz case, "which holds to the contrary, must be deemed to have been overruled" by *Graves* v. *New York,* 306 U.S. 466, 477 (1939). *United States* v. *Interstate Commerce Commission,* 78 F. Supp. 580, 583 (D.C. for D.C., 1948), reversed on other grounds, 337 U.S. 426, 69 Sup. Ct. 1410 (1949). The Court of Claims decision in the *Sunswick* case (discussed at length, *infra* page 18) is squarely contrary to the decision reached by the Court of Appeals below.

This case is of a character which has repeatedly arisen in the past (see cases cited in the prior footnote) and may be expected to arise constantly in the future. The growing multiplication of government functions and operations, as well as the growing multiplication of federal instrumentalities, renders it of importance that this Court address itself to the problem of liability involved when one agency of Government forbids or hinders performance under a contract entered into by another agency of Government.

II

The important error of the Court of Appeals decision was its assumption that Metals Reserve Company, as the lessee, was an innocent third party whose willingness and desire to perform its obligations under the lease were frustrated by an act of the War Production Board, representing the sovereignty of the United States. This assumption is without any justification. The plain facts disclosed by the record are that the War Production Board was at all times the federal instrumentality which provided full direction and control over the mining opera-

tions conducted by Metals Reserve Company. The War Production Board, as its name discloses, was charged with "war production," including the determinations of when it was desirable to commence, and when it was desirable to cease, working the chromium mines owned by Petitioner. Metals Reserve Company was merely a corporate instrumentality created for the convenience of the sovereign in conducting *operations,* as War Production Board was created for the convenience of the sovereign in providing *direction.*

The decision, if permitted to stand, will permit the United States to go into business on a more favorable basis than can any of its citizenry. By resort to the corporate device, the United States will be able to avoid liabilities in the conduct of its affairs which all private citizens must assume. Departments of Government will be enabled and encouraged to conduct business operations through a corporate instrumentality. Directions given by a government department to its corporate instrumentality to breach its obligations under a contract can be excused as a requirement of sovereignty.

The decision below is not in keeping with the "growing policy of government liability" in view of the "expanding conception of public morality regarding government responsibility." *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 396, 59 Sup. Ct 516, 521 (1939). In the *Keifer & Keifer* case, the Government endeavored to avoid responsibility on the theory of the nonsuability of one of its corporate instrumentalities. In the present case, the Court of Appeals sanctioned the Government's effort to avoid responsibility by emphasizing the entity and separateness of one of its corporate instrumentalities. There is, however, less reason here than in *Keifer & Keifer* why the Government should be permitted to escape its contractual obligation.

This Court has consistently held that the form Government takes in its operations is not material; that the realities of the case must govern; and that "the true nature of these modern devices for carrying out Governmental functions is recognized in other legal relations when realities become decisive." *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 524, 60 Sup. Ct. 646, 650 (1940); see also *Emergency Fleet Corp.* v. *Western Union*, 275 U.S. 415, 48 Sup. Ct. 198 (1928); *Clallam County* v. *United States*, 263 U.S. 341, 44 Sup. Ct. 121 (1923). Here, it is imperative to "pierce the corporate veil" of Metals Reserve Company and examine realities. The realities are that Metals Reserve Company was merely a convenient corporate instrumentality through which the War Production Board was discharging its responsibility to assure an adequate supply of chromium for the nation.

It is important to apprehend that this case does not involve merely the interpretation of the language of a lease. The case would be no different whether or not the specific language of Paragraph 29 of the lease, on which the Court of Appeals relied, was present. Even though the lease had not specifically stated that compliance with a "requirement of government" would excuse obligations, the legal results would be no different under the *Jones* and *Horowitz* cases. The true question is, not the language of a particular lease, but whether the United States can excuse its failure to perform under a contract on the ground that the contract was the obligation of one of its corporate instrumentalities and that another governmental instrumentality, having power to control and direct the corporation, determined to breach the contract.

III

We respectfully submit that the case was wrongly decided and reached a highly inequitable result. Dissenting Judge Pope assailed the majority opinion in langu-

age of unaccustomed vigor, believing that majority had reached a "bizarre result" (R. 174), and upheld a "specious defense" (R. 169), and refusing to believe "that the Government intended to drive any such sharp bargain with its citizens" (R. 179). In the circumstances presented, this language is not too harsh. When the United States enters into commercial operations, it ought to conduct these operations on the highest ethical plane. The present refusal of the United States to pay the price, while it enjoyed the fruits, of its bargain is not to be commended and ought not to be stamped, as it now is, with judicial approval.

The *Jones* and *Horowitz* doctrine, properly applied, clearly imposes liability on the Government. Here, the reality is that the Government leased Petitioner's mine for a term of five years, and agreed to compensate Petitioner, initially, on the basis of a stated sum per unit of ore mined. But in recognition that Petitioner had surrendered possession and control of its mine for a five year period, and would otherwise be assured of nothing since the Government was not obligated to undertake mining operations, the lease also prescribed a minimum annual royalty obligation.[1] It was this minimum royalty provision to which, of course, Petitioner looked for compensation in the event the Government decided to retain exclusive possession of the mine but not to pursue mining operations.

The Government did decide to suspend operations for the simple but adequate reason that the output of the

[1] The minimum annual royalty obligation was complied with in any year in which earned royalties equalled at least $30,000. But royalties earned in one year could not be credited to the payment accruing in any other minimum royalty year. (Par. 9, R. 17.) That the minimum fixed was a reasonable and modest one is suggested by the fact that earned royalties in 1943 were "ample" to meet the minimum annual royalty payment, although mining operations were conducted during less than half of 1943 (R. 119).

mine was not required. When the appropriate Government official, having power to decide, requested the suspension, the very contingency for which the minimum annual royalty obligation was designed should then have come into play. For the Government then to contend that the decision to suspend operations constituted a "requirement" of Government, invoking the *force majeure* clause of the lease, is to give this clause a strained and unnatural construction which was never within the contemplation of the parties.

Dissenting Judge Pope pointed to another aspect of the lease agreement which demonstrates how inequitable and paradoxical was the decision reached by the majority below. Judge Pope wrote (R. 178-179):

> "* * * paragraph 17 permits the lessee, on ninety days notice to the lessor, and payment of $1000, to surrender and terminate the lease. This is a paragraph inserted for the exclusive benefit of the lessee. Now if, as the majority opinion holds, the lessee, or its principal, the Government, may be a simple 'requirement' issued by the appropriate official, suspend all further performance under the lease, of what earthly use is paragraph 17? No need to terminate what you do not need to perform. Just keep a firm hold upon the lease, keep the lessor out of possession and still bound, while you are not! All the vice-chairman need do is to pass a 'requirement'! Almost as wonderful as 'God' in 'The Green Pastures' passing a miracle!"

Sunswick Corporation v. *United States*, 75 F. Supp. 221 (Ct. Cl., 1948), is in direct conflict with the majority opinion below. In the *Sunswick* case, the plaintiff entered into an agreement with the United States (acting through the Corps of Engineers, War Department) to undertake certain construction work, the agreement specifying the precise monetary wage to be paid carpenters. In the later dispute between the plaintiff and the union representing the carpenters, the Wage Adjustment Board of the Department of Labor reclassified the work being done by

the carpenters and required plaintiff to pay higher wages. In the subsequent suit by the contractor to recover the increased labor costs, the United States argued that "the contract under which plaintiff's claim arises was entered into by the Government in its capacity as a contracting party, acting through a contracting officer of the Corps of Engineers, War Department, whereas the act of the Government which brought about the increase in wages, namely, the directive order of January 10, 1945, was done in its sovereign capacity, acting through the Wage Adjustment Board of the Department of Labor. Defendant seeks to invoke the principle involved in Horowitz v. United States, 267 U.S. 458 * * *."

The Court of Claims ruled, however, that:

> "* * * this principle is inapplicable to the facts of this case. * * * It * * * does not follow that the action of the Wage Adjustment Board in directing the plaintiff to increase its carpenters' wages can be so isolated under the guise of an act of sovereignty as to permit the Government, in its capacity as a party to the contract, to disavow having had any part in such action, and to disclaim any liability for whatever increased burden this action may have added to the performance of the contract. The increased wage costs for which plaintiff seeks to be reimbursed resulted not from the Government's public and general act in setting up its wartime system for controlling and adjusting wages, nor from any widespread and general application of a device created for this public purpose as a matter of national policy, but rather from a specific order issued on a particular job by one agency of the Government, to wit, the Wage Adjustment Board, * * *."

Application of the *Sunswick* holding would clearly have required a different result in the present case. The present case does not present the complications of *Sunswick* where the Corps of Engineers and the Wage Adjustment Board had very different functions, with the activities of one in fixing wages interacting upon the construction activities of the other. Here, Metals Reserve Company and

WPB were both pursuing the identical objective of assuring adequate chromium supplies, with Metals Reserve Company being the operating agency through which the WPB functioned. Only WPB had the power to decide whether to engage actively in mining operations which the lease with Petitioner permitted. When WPB, as the agency with full power to make this decision, decided to suspend active operations, the provision for minimum royalties cannot be avoided by conjuring up the separateness of Metals Reserve Company and WPB and having it appear that Metals Reserve Company, as a mere innocent bystander, was prevented from fulfilling its obligations by an act of sovereignty.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

BURTON K. WHEELER
ROBERT G. SEAKS
Washington, D. C.

HORACE S. DAVIS
Billings, Montana

FRED L. GIBSON
Livingston, Montana
Attorneys for Petitioner

June 16, 1953

Of Counsel:

WHEELER & WHEELER
704 Southern Bldg.
Washington 5, D. C.

BROWN, DAVIS & SANDS
Montana National Bank Building
Billings, Montana

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 127

CHROMIUM PRODUCTS CORPORATION, *Petitioner*

v.

RECONSTRUCTION FINANCE CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 39-42) is not reported. The opinion of the Court of Appeals (R. 162-179) is reported in 202 F. 2d 664.

JURISDICTION

The judgment of the Court of Appeals was entered February 17, 1953 (R. 180). A petition

for rehearing was denied March 18, 1953 (R. 181). The petition for a writ of certiorari was filed June 16, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether in a suit brought by petitioner, as lessor of certain mineral lands leased to a Government-owned corporation, to recover minimum royalties, petitioner may properly avoid the force of a provision in the lease which excused payment of minimum royalties during a suspension of operations resulting from a "requirement, regulation, restriction or other act of any government", on the grounds that the Government was in reality the lessee and that the issuance of an order by the War Production Board requiring the suspension of mining under the lease did not relieve the lessee of its obligation to pay minimum royalties.

STATEMENT

The facts in the case, which are undisputed, may be summarized as follows:

Section 5 of the Act of June 25, 1940, 54 Stat. 572, 573, authorized respondent "to create, * * * corporations, with power (a) to produce, acquire, and carry strategic and critical materials." Pursuant to this authority respondent created Metals Reserve Company and subscribed for all its stock. The third section of the charter empowered

Metals Reserve "to make contracts, and to acquire, hold and dispose of real and personal property necessary and incident to the conduct of its business and to sue and be sued in any court of competent jurisdiction." The sixth section of the charter provided: "The stockholders shall not be liable for the debts, contracts or engagements of the corporation except to the extent of unpaid stock subscriptions."[1]

On May 27, 1941, petitioner granted Metals Reserve a lease (R. 8-28) giving the latter for five years (R. 8-9) the right to extract minerals from specified lands (R. 10) at specified royalties (R. 12-13). Paragraph 9 of the lease (R. 17) provided that beginning January 1, 1942, a minimum annual royalty of $30,000 should be paid. Paragraph 9 further provided that:

> should Lessee's construction or development or mining or milling operations or any other operation hereunder be suspended because of any of the causes or reasons set forth in Paragraph 29 hereof Lessee's obligation to pay a minimum royalty as aforesaid shall be suspended during any and all periods where such causes or reasons exist * * *.

Paragraph 29 of the lease (referred to in Paragraph 9) declared that (R. 26-27):

> Anything in this Lease contained to the contrary notwithstanding, any * * * require-

[1] The charter is published in 6 F. R. 2970.

> ment, regulation, restriction or other act of any government or governments * * * shall be considered sufficient justification for delay in such performance until such cause ceases to exist.

On January 16, 1942, the President established the War Production Board. Executive Order No. 9024, 7 F.R. 329 (R. 152-154). Section 3 of the Order required "Federal departments, establishments, and agencies [to] comply with the policies, plans, methods, and procedures in respect to war procurement and production as determined by the Chairman" of the Board (R. 153). Section 5 provided: "The Chairman may exercise the powers, authority, and discretion conferred upon him by this Order through such officials * * * as he may determine" (R. 154).

On February 24, 1942, the President transferred to the Secretary of Commerce[2] the functions of the Metals Reserve Company. Executive Order No. 9071, 7 F.R. 1531 (R. 150-151). Thereafter, pursuant to section 5 of Executive Order No. 9024, the Chairman of the War Production Board instructed the Secretary to accept the signature of Mr. Hiland G. Batcheller as Operations Vice Chairman on recommendations made by the Board to Metals Reserve Company (R. 143-144).

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[2] The Secretary of Commerce was also chairman of the board of directors of Metals Reserve Company.

On September 13, 1943, the War Production Board by a letter from Mr. Batcheller to the Secretary of Commerce directed that all operations on the leased premises be shut down (R. 107-111).

In consequence, Metals Reserve ceased mining operations under the lease and declined to pay minimum royalties after 1943.[3] As of January 31, 1945, pursuant to paragraph 17 thereof (R. 23), it terminated the lease (R. 135-138). Metals Reserve was dissolved by the Act of June 30, 1945, 59 Stat. 310, which provided also that respondent should assume and be subject to all its liabilities.

Petitioner sued respondent under the 1945 Act (R. 5) to recover minimum royalties from January 1, 1944, to January 31, 1945, plus interest (R. 3-28). The trial judge sitting without a jury concluded that the order of the War Production Board did not suspend the obligation to pay minimum royalties. On August 28, 1941, the court entered judgment for $45,942.31, i.e., $32,500, the minimum royalty claimed to be due, and six percent interest to the date of the judgment. (R. 56-57.) On respondent's appeal (R. 58), the Court of Appeals reversed and ordered the district court to enter judgment that petitioner should "take nothing by its complaint" (R. 180).

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[3] As petitioner points out (Pet. 17, fn. 1), royalties for the extraction of ore earned in 1943 before issuance of the War Production Board order exceeded the minimum royalty due in that year (R. 119).

ARGUMENT

The Court of Appeals held (R. 166-167) that the War Production Board's order of September 13, 1943, was a "restriction" imposed by the Government upon the mining operations of the Metals Reserve Company within the meaning of paragraph 29 of the lease and hence that under paragraph 9 its obligation to pay minimum royalties was suspended. Petitioner concedes (see e.g., Pet. 10, 14-15) that the Board's order compelled Metals Reserve to suspend mining operations, but it asserts that the United States was the real lessee (Pet. 16, 17, 18) and, invoking *Horowitz* v. *United States,* 267 U.S. 458, 461, contends that the obligation to pay minimum royalties was not suspended because of the rule applicable to the "United States when sued as a contractor."

The short answer to petitioner's contention is that this is not a suit against the United States. It is a suit against respondent, a corporation subjected by the Act of June 30, 1945, 59 Stat. 310, to the liabilities of Metals Reserve (R. 5; Pet. 6, fn. 1). However, that Act did not make respondent also answerable for liabilities of the United States. If — as it now professes — petitioner thought the latter liable, it should have sued the United States in an appropriate forum.[4] Not

[4] The United States District Court for the District of Montana (the trial court here) lacked jurisdiction to entertain a suit against the United States for more than $10,000. 28 U.S.C. 1346(a)(2).

having done so, it may not invoke a rule applicable only where the liability of the United States is in question. Accordingly, contrary to petitioner's contention (Pet. 12-14, 17), this suit does not involve the principle enunciated in the *Horowitz* case and there is no warrant for the assertion (Pet. 14, 18-20) that the decision of the Court of Appeals is in conflict with that of the Court of Claims in *Sunswick Corporation* v. *United States,* 75 F. Supp. 221, which, like the *Horowitz* case, was a suit against the United States.

Apart from its irrelevance in a suit against the corporation, there is no merit in petitioner's contention, which seems to be the premise of its case (see Pet. 16, 17, 18), that the United States was the real lessee. As petitioner recognizes (Pet. 15-16), its supposition that the United States was the lessee requires disregard of the existence of Metals Reserve Company, a corporation created by authority of Congress and endowed with capacity to acquire and dispose of property and to sue and be sued. Petitioner suggests no reason—and manifestly there is none—for ignoring the corporate entity. See e.g., *Skinner & Eddy Corp.* v. *McCarl,* 275 U.S. 1, 6, *et seq.; Reconstruction Finance Corporation* v. *Menihan Corp.,* 312 U.S. 81; *Dalton* v. *United States,* 71 C. Cls. 421, 425, *et seq.; Farm Security Administration* v. *Herren,* 165 F. 2d 554 (C.A. 8). Indeed, the charter provision of Metals Reserve that its stock-

holders should not be liable for its acts plainly shows that those dealing with it were not to look beyond it for redress.

Stripped of the claim that the United States was the real lessee, the case involves simply the construction of the provisions of a lease between two corporations. There is nothing in the lease to indicate that the parties intended the words "requirement, regulation, restriction or other act of any government or governments" to have a meaning other than that ordinarily attributed to them. Thus, it is clear that had the lease been entered into between individuals or private corporations, the order of the War Production Board suspending operations would have been an act of government that would have relieved the lessee from its obligation to pay minimum royalties. Petitioner shows no sound reason, and there is none, why the words in a lease entered into with a Government-owned corporation should, in the absence of expressions of a contrary intention, be given a meaning different from the same words when used in a lease by individuals or private corporations. There is therefore no error in the holding of the Court of Appeals (R. 169) that under the contract "the action of the government relieved the Metals Reserve Company from the liability for [payment of] the minimum royalty." In any event, the interpretation of the lease pre-

sents no question of such large public importance as to warrant review by this Court.

CONCLUSION

The decision of the court below is correct, and there is no need for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

OSCAR H. DAVIS,
Acting Solicitor General.

J. EDWARD WILLIAMS,
Acting Assistant
Attorney General.

JOHN F. COTTER,
EDMUND B. CLARK,
Attorneys.

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